STATE OF MICHIGAN

COURT OF APPEALS

ELIZABETH M. SCHNITZLER, Plaintiff-Appellee,	UNPUBLISHED June 27, 2006
V	No. 259370 Calhoun Circuit Court
DANIEL R. DONATO and BARBARA A. DONATO, Defendants-Appellants.	LC No. 03-002829-CZ

Before: Fort Hood, P.J., and Cavanagh and Servitto, JJ.

PER CURIAM.

Defendants appeal as of right a judgment in favor of plaintiff, declaring that the quitclaim deed transferring interest in plaintiff's property to defendants was void on the basis of undue influence. Because plaintiff did not establish undue influence by a preponderance of the evidence, we reverse.

Plaintiff Elizabeth Schnitzler is the mother of four adult children. Defendant Daniel Donato married plaintiff's daughter, Patricia, in 1968, and they divorced in January 1993. In October 1993, Daniel married plaintiff's other daughter, defendant Barbara Donato. In 1995, plaintiff executed a will in which she bequeathed $1,000 to Patricia and devised the remainder of her estate equally to her other three children and Daniel. She also executed a medical durable power of attorney in the same year, appointing Daniel as her patient advocate. On October 23, 1998, plaintiff conveyed her home to defendants by way of a quitclaim deed, reserving a life estate in the property. On the same day, she appointed Daniel as her durable power of attorney. Attorney David Tomlinson drafted the 1995 will, medical durable power of attorney, 1998 quit claim deed, and durable power of attorney.

In July 2003, plaintiff went to Tomlinson's office to obtain a copy of her 1995 will. At that time, she also received a copy of the quitclaim deed and various other documents. She subsequently initiated this action, challenging the validity of the deed. A bench trial was held in this matter on August 11 and 12, 2004. At the conclusion of the trial, the trial court issued a written opinion declaring that the deed was void on the basis of undue influence.

On appeal, defendants first contend that the trial court erred when it concluded that plaintiff was unduly influenced by defendants when she conveyed her property to them. We agree.

Following a bench trial, we review a trial court's findings of fact for clear error and review de novo its conclusions of law. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Assoc,* 264 Mich App 523, 531; 695 NW2d 508 (2004). A finding is clearly erroneous when, although there is evidence to support the finding, we are left with a definite and firm conviction that a mistake has been made. *Id.*

Here, the trial court made several findings of fact that were clearly erroneous. For example, the trial court found that "[p]laintiff's consistent desire after the death of her husband was that her residence would one day be bequeathed to her children," and that "moral coercion and persuasion over the years prior to 1998 caused the [p]laintiff to act contrary to her own wishes and desires and in conformity with the desire of [d]efendants." While plaintiff, two of her children, and one neighbor testified that plaintiff wanted to divide her assets equally among her children upon her death, one witness testified that plaintiff actually revealed that specific intention to him 18 years before the conveyance to defendants. It was unclear on the record when plaintiff revealed that intention to the other witnesses. Thus, their testimony does not establish that plaintiff had a "consistent desire" to devise her home to her children, and it does not establish what plaintiff's intended desire was at the time she signed the quitclaim deed in 1998. Moreover, plaintiff's 1995 will, which bequeathed only $1,000 to her daughter Patricia and devised the remainder of her estate to her other three children and Daniel, is further evidence that plaintiff did not have a "consistent desire" that her residence would be bequeathed to her children equally on her death.

The trial court also found that, prior to 1998, defendants "controlled [plaintiff's] finances subsequent to 1993" and "essentially provided for the necessities in her life" was also clearly erroneous. Daniel testified that, in 1993 or 1994, defendants names were added to plaintiff's accounts. According to Daniel, he assisted plaintiff at that time with her checkbook because she was unable to balance her accounts. However, he "took over" her checkbook only in 2000, when her mental state allegedly deteriorated. Plaintiff herself testified that, before 1998, she "didn't have [Daniel] do [her] checking account." She testified: "I'd give them the money. I'd tell them to pick up a check and go pay [the bills]." Moreover, although there was testimony that defendants made extensive improvements in plaintiff's home and provided her transportation, there was no testimony to support the trial court's conclusion that defendants "essentially provided for the necessities" of plaintiff's life at any time. Plaintiff, in fact, testified that her money paid for her bills.

While we conclude that some of the trial court's factual findings were erroneous, we nevertheless agree with the trial court that plaintiff presented sufficient evidence to establish a presumption of undue influence.

To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, are not sufficient. *Nelson v Wiggins,* 172 Mich 191; 137 NW 623 (1912). However, in some transactions the law presumes undue influence. The presumption of undue influence is brought to life upon the introduction of evidence which would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an opportunity

to influence the grantor's decision in that transaction. [*Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976).]

The presumption of undue influence was brought to life in this case. First, a fiduciary relationship existed between defendants and plaintiff. A fiduciary relationship "exists when there is a reposing of faith, confidence, and trust and the placing of reliance by one on the judgment and advice of another." *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 680; 591 NW2d 438 (1998). The evidence established that plaintiff trusted and had confidence in defendants. She depended upon them to make improvements to her home, to perform general maintenance for her, and to handle some of her financial affairs, beginning as early as 1993 or 1994. Moreover, Daniel testified that plaintiff trusted him absolutely. Second, defendants benefited from the conveyance because they received an immediate interest in plaintiff's property, subject only to her life estate. Third, defendants had the opportunity to influence plaintiff's decision in the transaction. They were present nearly every day in plaintiff's life and they met with attorney Tomlinson, outside the presence of plaintiff, to discuss the deed. They were also in the room when attorney Tomlinson explained the deed to plaintiff and asked her whether the deed represented her intentions. Because each of the factors necessary for the presumption was introduced, a mandatory inference of undue influence was created. *In re Estate of Mikeska*, 140 Mich App 116, 121; 362 NW2d 906 (1985).

However, the evidence presented at trial was clearly sufficient to rebut the mandatory inference of undue influence. Defendants testified that they did not exert undue influence over plaintiff. While such testimony does not overcome the presumption as a matter of law, it leaves a permissible inference to be weighed with other evidence. See *In re Cox Estate*, 383 Mich 108, 116; 174 NW2d 558 (1970). In addition, while several witnesses testified that Daniel was perhaps unfriendly and may have appeared to isolate plaintiff from friends and family, no witness testified to any specific incident that would evidence undue influence over plaintiff. At least one neighbor testified that plaintiff bragged about defendants and how good they were to her.

Further, attorney Tomlinson testified that when he drafted the quitclaim deed and discussed the deed with plaintiff, he was representing plaintiff and not defendants. Tomlinson testified that he explained the deed to and inquired if she wanted to deed the property to defendants. Tomlinson testified there was no doubt in his mind that plaintiff understood what she was signing and that she appeared to be someone who knew what she wanted, and held a firm belief about what she wanted to do.

Furthermore, while plaintiff's mental state appeared to be at issue, there was no evidence suggesting that plaintiff's decreased mental state contributed to her decision to convey the property to defendants. Although several witnesses testified that plaintiff's mental state started to deteriorate in 2000, the conveyance was made in 1998 and there is nothing to indicate that, in 1998, plaintiff lacked the capacity to convey her property to defendants or that, at that time, she did not understand the significance of the conveyance. No evidence was introduced indicating that plaintiff's mental state was an issue in 1998. Witnesses testified, in fact, that before 2000, plaintiff was "strong willed." Attorney Tomlinson testified that, when he explained the conveyance to plaintiff, she was "very very sharp" and he had no doubt that she understood the conveyance.

This court recognizes that by October 2003, plaintiff did not specifically remember meeting with Tomlinson in 1995 or 1998 and did not remember signing any documents at his office. However, plaintiff did recognize her signature on the deed and admitted several times throughout her testimony that she could make mistakes. Moreover, what plaintiff recalls in October, 2003 has little bearing on what she did or did not do in 1998.

Because the presumption of undue influence was rebutted, plaintiff could not rely on the use of the presumption to satisfy her burden of persuasion on the issue of undue influence. *Kar, supra* at 542. Without the presumption, plaintiff failed to satisfy her burden of persuasion. Plaintiff presented evidence that defendants believed they were entitled to receive the home as compensation for the time and money they expended improving the home. Moreover, she presented evidence that, before 1998, defendants were at plaintiff's house frequently, that their names were on her financial accounts, and that they scheduled the meetings between plaintiff and attorney Tomlinson. Thus, she presented evidence that they had the motive and the opportunity to exercise undue influence over her. However, she failed to present any affirmative evidence that they actually *exercised* the opportunity to control her or that they subjected her to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower her volition. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that is was exercised, is not sufficient to establish undue influence. *In re Erickson Estate,* 202 Mich App 329, 331; 508 NW2d 181 (1993). Because plaintiff failed to meet her burden of persuasion on the issue of undue influence, the trial court erred in concluding that the quitclaim deed was void. We therefore reverse the decision of the trial court.

Defendants next contend that the trial court erred in failing to appoint plaintiff a next friend pursuant to MCR 2.201(E)(1)(b). We disagree.

We review the interpretation and application of court rules de novo. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003). MCR 2.201(E) governs the appointment of a guardian ad litem or next friend to appear on behalf of an incompetent person.

> If a minor or incompetent person does not have a conservator to represent the person as plaintiff, the court shall appoint a competent and responsible person to appear as next friend on his or her behalf, and the next friend is responsible for the costs of the action. [MCR 2.201(E)(1)(b).]

In *Redding v Redding*, 214 Mich App 639, 644; 543 NW2d 75 (1995), this Court explained that "MCR 2.201(E) governs the appointment of a guardian ad litem *for a person who has already been adjudicated legally incapacitated*" (emphasis added). The trial court, then, does not appoint a guardian ad litem for a party unless the court has afforded the party a hearing to determine whether the party is legally incompetent. *Id.*

Defendants contend that the trial court was required to appoint plaintiff a next friend primarily because the she was unavailable to testify at trial pursuant to MRE 804(a)(4) ("then existing physical or mental illness or infirmity"). Regardless of whether plaintiff was unavailable to testify at trial, however, she was never adjudicated legally incapacitated. No proper motion or proceeding was initiated for a determination of plaintiff's competence to pursue this civil action in her own name. The probate court has exclusive legal and equitable jurisdiction over "a proceeding that concerns a guardianship, conservatorship, or protective proceeding." MCL 700.1302(c). Thus, "[t]he proper remedy where a question of mental

competency arises is a petition in probate court for a finding of incapacity and appointment of a guardian under MCL 700.443(1) [Repealed; see now MCL 700.5303]." *Redding, supra* at 645. Because defendants failed to petition the probate court for a finding of incapacity and appointment of a guardian, plaintiff was not afforded a hearing to determine whether she was legally incompetent. Therefore, the trial court lacked the authority to appoint a next friend pursuant to MCR 2.201(E).

Finally, defendants argue that the trial court erred in denying their motion for a directed verdict. We disagree.

The Court notes that defendants' motion is actually a motion for involuntary dismissal. "Such a motion is granted in a bench trial when the court is satisfied after the presentation of the plaintiff's evidence that on the facts and the law the plaintiff has shown no right to relief." MCR 2.504(B)(2); *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 235-236 fn 2; 615 NW2d 241 (2000). A motion for involuntary dismissal calls upon the court to assess the facts, weigh the evidence, judge the credibility of the witnesses, and select between conflicting inferences. *Marderosian v The Stroh Brewery Co*, 123 Mich App 719, 724; 333 NW2d 341 (1983). Unlike a motion for directed verdict, the plaintiff is not given the advantage of the most favorable interpretation of the evidence. *Id.*

At the time defendants moved for a directed verdict, plaintiff had presented sufficient evidence to create a presumption of undue influence. And, at that time, defendants had not yet presented sufficient evidence to rebut that presumption. Tomlinson, for example, had not yet testified, nor had Barbara Donato. Thus, at the time of the directed verdict motion, plaintiff was entitled to a "mandatory inference" of undue influence (*Kar, supra* at 541-542) and a directed verdict was not warranted.

Reversed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto